IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. ———.

STATE OF MISSOURI, Creditor, *Petitioner,* vs. JOHN T. ROSS, Trustee, et al., *Respondents.*	*Circuit Court of Appeals, Eighth Circuit, Nos. 10239 & 10281.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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GILBERT LAMB,
Of Counsel,
Attorneys for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
I. Decree below	1
II. Questions presented	2
III. Statutes involved	3
IV. Statement	5
V. Rulings of the court below	6
VI. Reasons for granting the writ	7
Brief in support of petition for writ of certiorari	10
I. Opinions	10
II. Jurisdiction	10
(a) Statutory provisions	10
(b) Date of decree	11
(c) Nature of case	11
(d) Cases sustaining jurisdiction	12
III. Facts	12
IV. Specification of error	13
V. Summary of argument	13
VI. Argument	14
1. Lien exists in favor of petitioner, not voided by a bankruptcy act	14
2. Court erred in construction of Section 64a of Bankruptcy Act in that	16
(a) Decision ignores the spirit and purpose of entire act	17
(b) Decision ignores the rule that state priority laws are in pari materia with bankruptcy act and that all laws should be construed together.	21
(c) Decision ignores rule that sovereign rights are relinquished only by plain, specific and unambiguous legislation	26
3. Discussion of cases cited in lower court opinion	29
VII. Conclusion	32

Table of Cases Cited.

City of Waco vs. Bryan, 127 Fed. 79 (C. C. A. 5)	31
Davis vs. Pringle, 268 U. S. 315, 69 L. Ed. 974	25, 28
DuPont DeNemours Co. vs. Davis, 264 U. S. 456; 68 L. Ed. 788.	27
Francis vs. McNeal, 228 U. S. 695; 57 L. Ed. 1029	17
Glaser vs. Rothchild, 221 Mo. 180	15
Hauselt vs. Harrison, 105 U. S. 401, 25 L. Ed. 1075	16
Holden vs. Stratton, 191 U. S. 115, 48 L. Ed. 116	12
Holt vs. Crucible Steel Co., 224 U. S. 262; 56 L. Ed. 756	16
Hurley vs. A. T. & S. Fe. R. R. 213 U. S. 126; 53 L. Ed. 729	16

Page

In Re: Falls City Shirt Mfg. Co., 98 Fed. 592 (D. Ky.) 20, 22
In Re: A. E. Fountain Co. 295 Fed. 873 (D. N. Y.) 32
In Re: E. J. Hibner Oil Co. 264 Fed. 667 (C. C. A. 7) 21
In Re: Jacobson, 263 Fed. 883 (C. C. A. 7) 21
In Re: Tidewater Coal Company, 280 Fed. 648 (C. C. A. 2) 27
In Re: A. J. Waterman Mfg. Co. 291 Fed. 589 (D. Maine) 31
In Re: Wiley, 292 Fed. 900 (D. Georgia) 31
In Re: Worcester County, 102 Fed. 808 (C. C. A. 1) 24
In Re: Wright, 95 Fed. 807 (D. Mass.) 24
Johnson vs. Root Mfg. Co. 241 U. S. 160; 61 L. Ed. 934 16
Liberty Mutual Ins. Co. vs. Johnson Shipyards Corp. 300 Fed. 952 (D. C. N. Y.) 27
New Jersey vs. Anderson, 203 U. S. 483; 51 L. Ed. 284 ..... 8, 29, 33
Orcutt Company vs. Green, 204 U. S. 96; 51 L. Ed. 390 12
Price vs. United States, 269 U. S. 492, 70 L. Ed. 373 32
Rock Island Plow Company vs. Reardon, 222 U. S. 354; 56 L. Ed. 231 16
State of Missouri, Creditor, vs. Ross, etc., No. 10239 26
State of Missouri, Creditor, vs. Ross, etc., No. 10281 26
State of Missouri ex rel. Gentry vs. Page Bank, 14 S. W. (2d) 597 27
State of Missouri ex rel. Karrenbrock vs. Trust Co. 209 Mo. 471 .. 15
State of Missouri to the use of Phillips vs. Rowse, 49 Mo. 586 14
Taylor vs. Voss, 271 U. S. 176; 70 L. Ed. 889 12
United States vs. Kaplan, 74 Fed. (2d) 664 (C. C. A. 2) 21
United States vs. National Surety Company, 254 U. S. 73, 65 L. Ed. 143 26

Table of Statutes Cited.

Act of February 13th, 1925, Chapter 229, Section 1, 43 Stat. 938; 28 U. S. C. A. 347 10
Bankruptcy Act of 1867, Section 28, Ch. 176; Laws of United States, 1867, p. 531, R. S. 1878, Section 5101 (5) 19, 33
Bankruptcy Act, Section 64; 11 U. S. C. A. 104 ..... 4, 11, 26
Bankruptcy Act, Section 64a; 11 U. S. C. A. 104a 2, 3, 5, 6, 7, 8, 13, 16, 17, 20, 23, 28, 29, 31, 32, 33
Bankruptcy Act, Section 64b(6); 11 U. S. C. A. 104b(6) 2, 6, 11, 22
Bankruptcy Act, Section 64b(7); 11 U. S. C. A. 104b(7) 11, 19, 22, 23, 24, 30
Bankruptcy Act, Section 67d; 11 U. S. C. A. 107d 2, 3, 7
Laws of Missouri 1881, page 35 15
Revised Statutes of Missouri, Article II, Chapter 41 5
Revised Statutes of Missouri, Section 3152 ... 2, 3, 5, 15, 18, 21, 22, 24, 26
Revised Statutes of United States, Section 3466; 31 U. S. C. A. 191 ..... 21, 22, 26, 32

Table of Texts Cited.

Lewis' Sutherland Statutory Construction (2nd Ed.), p. 931 27
Remington on Bankruptcy, 4th Edition, Section 20 18

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No. ——.

STATE OF MISSOURI, Creditor, *Petitioner,* vs. JOHN T. ROSS, Trustee in Bankruptcy of LAESSIG'S OIL PRODUCTS, Incorporated, and the City of St. Louis, Creditor, *Respondents.*	*Circuit Court of Appeals, Eighth Circuit, Nos. 10239 & 10281.*

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the State of Missouri, respectfully shows as grounds for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

I.

Decree Below.

This writ is sought to review and revise the decree of the Circuit Court of Appeals for the Eighth Circuit which in effect requires the Respondent Trustee in Bankruptcy to pay the claim of the petitioner for gasoline taxes on an equality with that of the Respondent City of St. Louis,

rather than satisfying petitioner's claim in full before disbursing any funds of the bankrupt estate in payment of the claim of the Respondent city. The writ of certiorari hereby sought to be issued is to review the decree of the Circuit Court of Appeals for the Eighth Circuit entered in the cases of State of Missouri, Creditor, vs. John T. Ross, Trustee, No. 10239 and State of Missouri, Creditor, vs. John T. Ross, Trustee, etc., et al. No. 10281, on December 3, 1935 (R. 49), Motion for Rehearing was overruled on December 31, 1935 (R. 52), thus affirming the decree of the District Court of Missouri (R. 34). The two appeals were briefed and argued as one case, one transcript of record being supplied and one motion for rehearing being filed. One joint decree was entered.

II.

Questions Presented.

(1) Whether or not a tax claim due the Sovereign State of Missouri, which under the Law of Missouri accedes to the dignity of an equitable or quasi lien, is allowable as a lien against the property and assets of a bankrupt, such lien being preserved under Section 67(d) of the Bankruptcy Act (11 U. S. C. A. 107d).

(2) Whether or not the provisions of Section 64a and Section 64b(6) of the Bankruptcy Act are to be construed as the exclusive and sole provisions governing allowance of tax claims and if such affirmatively require the allowance of all taxes due the United States, State, county, district or municipality on an equal basis.

(3) Whether or not the provisions of Section 3152 R. S. Missouri 1929, may be construed as in pari materia with Sections 64a and 64b(6) of the Bankruptcy Act.

The substance of petitioner's claim is:

First, the sovereign right of the State of Missouri to receive payment of its debt in advance of payment to other creditors has been by State courts construed to be like an equitable or quasi lien, and that equitable liens are preserved by Section 67d of the Bankruptcy Act, (11 U. S. C. A.

104d), and should be paid in advance of other payments just as though a specific statutory lien had been declared by statute to exist upon the bankrupt's property;

Second, that if the first contention fails there is nothing in the provisions of the Bankruptcy Act and particularly Subdivision 64a and 64b(6) affirmatively requiring the allowance of all tax claims on an equal basis, or indicating a congressional intent to so provide, from which it follows that congress, having adopted the common law rule of the sovereignty being entitled to payment of its debt first by the enactment of Section 3466, R. S. U. S. (31 U. S. C. A. 191), cannot be construed as having relinquished that sovereign right of the United States or to have destroyed the corresponding sovereign right of Missouri by mere innuendo or construction as sovereign rights may only be reduced or relinquished by specific and certain legislation;

Third, that the provisions of Section 3152 R. S. Missouri 1929, which are merely declaratory of the common law existent in the State of Missouri, is in pari materia with Sections 64a and 64b(6) of the Bankruptcy Act; that a proper construction of such latter sections consistent with the general policy and purpose of the Bankruptcy Act requires that Section 3152 be considered in determining the relative priority between taxes designated in Section 64a;

III.

Statutes Involved.

The three statutes primarily involved in this cause are Section 67d of the Bankruptcy Act, (11 U. S. C. A. 107d) which reads in part as follows:

> "Liens given or accepted in good faith and not in contemplation of or in fraud upon the provisions of this title, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by anything herein."

Section 64 of the Bankruptcy Act, (11 U. S. C. A. 104), reads as follows:

"(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: Provided, that no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

(b) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorneys fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary and involuntary cases, as the court may allow; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses of such creditors in opposing such composition; (5) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commence-

ment of the proceeding, not to exceed $600 to each claimant; (6) taxes payable under paragraph (a) hereof and (7) debts owing to any person who by the laws of the States or the United States is entitled to priority: Provided, that the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States."

And Section 3152 R. S. Missouri 1929, providing in part as follows:

> "Whenever any person indebted to the state of Missouri is insolvent, * * * the debts due to the State of Missouri shall be first satisfied, and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof, * * * as to cases in which an act of bankruptcy is committed: Provided, that nothing in this article contained shall be construed to interfere with the priority of the United States as secured by law, * * * ."

IV.

Statement.

Your petitioner, together with the Respondent, City of St. Louis, became creditors of the Bankrupt, Laessig's Oil Products Company, of which Respondent John T. Ross became trustee, because of motor vehicle taxes due petitioner and Respondent City under Article II of Chapter 41 R. S. Missouri 1929, and pertinent provisions of the City Charter of the City of St. Louis respectively. In due time petitioner and respondent city filed claims which were allowed by the Referee under Section 64a of the Bankruptcy Act, 11 U. S. C. A. 104a, as preferred claims of equal dignity against the estate of the bankrupt (R. 4, 9). In due time the petitioner moved for modification of the order so as to permit and require petitioner's claim to be paid in full prior to any payment on the claim of respondent city (R. 9). This motion was denied (R. 10), and review sought to the United States District Court for the Eastern District of Missouri (R. 11). Judge Charles B. Davis, District Judge, approved

and confirmed the order of the Referee on December 31, 1934 (R. 21). In due time appeal was allowed by the United States Circuit Court of Appeals, being numbered 10239 (R. 36, 37), and by the United States District Court being numbered 10281 (R. 23). These appeals were consolidated and so treated by the United States Circuit Court of Appeals, Eighth Circuit. On December 3, 1935, the Circuit Court of Appeals entered its joint decree affirming the order of the District Court appealed from (R. 49). Within the time required, petition for rehearing (R. 50) was duly filed which was on December 31, 1935, overruled (R. 52). Thereafter stay of mandate was asked and granted pending application to this Honorable Court (R. 53).

V.

Rulings of the Court Below.

The Court of Appeals by its decision determined: First, (R. 46)

> "the asserted right of priority (of the state) is not predicated upon any lien that attached to the property,";

Second, (R. 47) that the provisions of Section 64a and Subdivision 6 of Section 64b of the Bankruptcy Act did

> "not contemplate any right of priority as between various taxing districts,";

Third, (R. 46) that the provisions of Section 3152, R. S. Missouri 1929, providing that in cases of insolvency the State's claims should be first satisfied except for the priority secured to the United States by law was not applicable because

> "the right of priority in payment of claims against a bankrupt estate * * * must be found in the Bankruptcy Act".

VI.

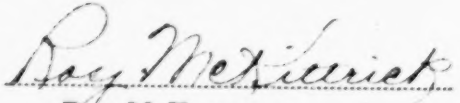
Reasons for Granting the Writ.

(a) The opinion in the instant case holds that petitioner's right of priority is not predicated upon any lien (R. 46). While it is true that no specific statutory lien can be claimed yet the petitioner did claim the quasi equitable lien preserved under Section 67d of the Bankruptcy Act. While the decisions are not entirely uniform as to the recognition of equitable liens in bankruptcy proceedings yet it is certain that the decision on this important question of general law is in conflict with the weight of authority and is probably in conflict with the decisions of this Honorable Court. This being a bankruptcy proceeding and the issue being the status of this claim under the Bankruptcy Act, it cannot be doubted but that it presents a federal question. It is the general rule and practice for federal bankruptcy courts to recognize liens of various kinds and especially equitable liens which come into existence by virtue of state law. In refusing to recognize the quasi equitable lien attached to petitioner's tax claim the Court has departed from the settled rule as established by this Court.

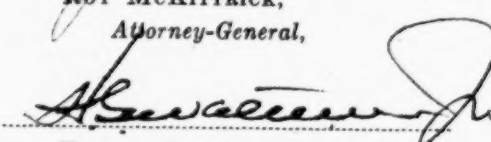
(b) The decision in the instant case insofar as it construes Section 64a of the Bankruptcy Act concerns an important question of federal law which has not been but should be settled by this court. The Court in its decision held that Section 64a did "not contemplate any right of priority as between various taxing districts" (R. 47). It is difficult for us to over-estimate the importance of this problem under present day conditions. With ever increasing Federal, State and local tax programs the conflict between the levying authorities is daily becoming more frequent. This court has never passed upon the proper construction of this section in any case in which the construction thereof was at issue. In the instant case the conflict is between the State and one of its municipalities, the Federal government's claim for priority not being involved as no federal taxes were delinquent. Nevertheless it is but a matter of time until some of the bankruptcy cases now pend-

ing in which this conflict arises will reach this Honorable Court. The court's construction of the section in the instant case will of course be determinative of the relative rights under Section 64a of the Bankruptcy Act of all taxing powers. The only decision of this Court in which the present issue has been touched upon is that of New Jersey vs. Anderson, 203 U. S. 483, 51 L. ed. 284, the pertinent statement in which petitioner earnestly asserts cannot be considered as more than obiter dictum. Because of some lower court decisions which tend to obscure rather than clarify a proper conception of this law and the assertions in the case of New Jersey vs. Anderson supra, this court should clarify the law on this question.

The court in its decision has applied cases holding "the right of priority in payment of claims against a bankrupt estate * * * must be found in the bankruptcy act," (R. 46), to a construction of Section 64a in the case erroneously. The cases in which this statement is found have been cases in which a priority was claimed, provision for which could not be found at any place in any provision of the bankruptcy act. By applying such rules to situations as existing in the instant case the instant decision has tended to further obscure the correct construction of Section 64 of the Bankruptcy Act.



ROY MCKITTRICK,
Attorney-General,



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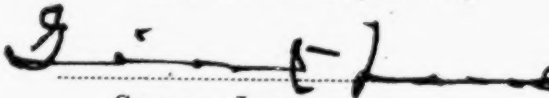

GILBERT LAMB,
Of Counsel,

Counsel for Petitioner.

State of Missouri,
County of Cole. } *ss.*

Gilbert Lamb being duly sworn upon oath states that he is agent and attorney for the petitioner named in the foregoing petition, and makes this affidavit for and on behalf of said petitioner; that he has read the same and knows the contents thereof and that the facts therein stated are true to the best of his knowledge, information and belief.

Subscribed and sworn to before me a notary public for Cole County, Missouri, this 19th day of February, 1936.

Notary Public

My commission expires ~~January 21, 1937.~~

AUG 5 - 1937

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions.

An opinion was rendered by the Referee in Bankruptcy hearing petitioner's claim. It was written by Honorable John A. Hope and filed September 21, 1934. It appears on page 15 of the record. Upon review in the District Court Honorable Chas. B. Davis, District Judge, entered an order approving and confirming the order of the referee in all respects. This order is found at page 21 of the record. The opinion of the United States Circuit Court of Appeals (Judges Gardner, Woodrough and Farris), Judge Gardner writing, was filed on December 3, 1935, as appears on page 44 of the record. None of the opinions or orders have been reported up to this time.

II.

Jurisdiction.

Petitioner in support of the jurisdiction of this court to review the above case on writ of certiorari respectfully states:

(a) STATUTORY PROVISIONS.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938 (28 U. S. C. A. 347), as amended January 31, 1928, Chapter 14, Section 1, 45 Stat. 54, and June 7, 1934, Chapter 425, 48 Stat. 926, provides in part as follows:

> "In any case, civil or criminal, in a circuit court of appeals or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, whether government or other litigate, to require by certiorari either before or after a judgment or decree by such lower court, that the cause be certified

to the Supreme Court for determination by it with the same power and authority and with like affect, as if the case had been brought, by unrestricted appeal."

(b) DATE OF DECREE.

The judgment and decree sought to be reviewed was entered December 3, 1935 (R. 44). Petition for rehearing was duly filed on the 17th day of December, 1935 (R. 51). Petition for rehearing was denied on the 31st day of December, 1935 (R. 52). This petition for certiorari was filed in this court on the .... day of February, 1936.

(c) NATURE OF CASE.

This case began by the filing of claims in the Bankruptcy Court of the Eastern Division of the Eastern District of Missouri. No dispute arose between the claimants or with the trustee as to the amount which should be allowed either petitioner or Respondent City of St. Louis. The whole issue is one of priority of payment. This becomes acute because there are insufficient assets in the estate to pay all taxes which have been allowed in the preferred class of taxes. Many years ago it was a very uncommon occurrence for the assets of the Bankrupt's estate to be insufficient to pay the tax claims which constituted legal demands against the estate. In recent years this situation is occurring frequently as many new and different taxes are being assessed and levied by the Federal, State and local governments. This problem will become increasingly important.

The opinion of the United States Circuit Court of Appeals, Eighth Circuit, in the instant case holds that the equitable or quasi lien claimed by petitioner to be an attribute of the State taxes is not enforceable in bankruptcy, that a proper construction of Section 64 of the Bankruptcy Act does not provide for any priorities as between taxes due the United States, State, county, district or municipality, and that gasoline taxes are to be allowed and paid under the provisions of Section 64b(6) rather than under the provisions of Section 64b(7) of the Bankruptcy Act. This being the

case, it is clear that the subject matter is the construction of a Federal Law, to-wit, the Bankruptcy Act, and the decision being a final decree of a United States Circuit Court of Appeals, jurisdiction to review by certiorari rests in this court.

(d) CASES SUSTAINING JURISDICTION.

Holden vs. Stratton, 191 U. S. 115, 48 L. Ed. 116;
Orcutt Company vs. Green, 204 U. S. 96, 51 L. Ed. 390;
Taylor vs. Voss, 271 U. S. 176, 70 L. Ed. 889.

III.

Facts.

The facts in the instant case are few and undisputed. The bankrupt was a duly licensed distributor of motor vehicle fuels operating in the State of Missouri. He was also licensed under the City of St. Louis for the privilege of storing gasoline and motor vehicle fuels. As such he became obligated to the City to the extent of one cent per gallon on all motor vehicle fuels so stored, and to the State in the amount of two cents per gallon for each gallon of motor vehicle fuels received for sale and distribution in the State of Missouri. Over a period of some nine months the Bankrupt became indebted to the City to the extent of in excess of Nine Thousand Dollars (R. 4, 5, 6, & 7). Over a period of five months the bankrupt became indebted to the State for approximately Eighty-four Hundred Dollars (R. 3). The Respondent Trustee had in his hands less than Twelve Thousand Dollars with which to pay tax claims of over Seventeen Thousand Five Hundred Dollars and some small amount of costs and administration expenses (R. 14). As there were insufficient funds with which to pay the tax claims of both the Respondent City of St. Louis and the Petitioner the question arose as to which claimant was entitled to satisfaction in full of its claim, or whether the funds available should be pro rated between the claimants. The issue is solely one of law involving the proper construction of the Bankruptcy Act.

IV.

Specification of Errors.

1.

The Court erred in adjudging and decreeing that the tax claim of the State of Missouri was not clothed with a lien in the assets of the estate not voided by bankruptcy.

2.

The Court erred in construing Section 64a of the Bankruptcy Act (11 U. S. C. A. 104a) as intending and requiring that state and municipal taxes be allowed and paid on a parity, and in the absence of sufficient funds to pay all taxes in full, that such funds should be pro rated.

V.

Summary of Argument.

1.

A lien exists in favor of petitioner for taxes claimed which is not voided by the bankruptcy act.

2.

If Point 1 of this brief is decided adversely to petitioner it is respectfully urged that the court erred in its construction of the provisions of Sections 64a of the Bankruptcy Act in that:

(a) The lower court's construction of such law is contrary to the spirit and purpose of the Bankruptcy Act.

(b) The lower court's construction of such law ignores the proposition that Federal and State laws are in pari materia with the Bankruptcy Act and all such laws should be construed as having force and effect if they can be construed together.

(c) The lower court's construction of such law ignores the recognized rule that legislative acts are not to be construed as releasing and relinquishing sovereign rights unless such acts do so in plain, specific and unambiguous legislation. If an act is susceptible of two constructions the courts will construe the act as not intending to surrender sovereign or public rights.

3.

Discussion of cases cited in lower court opinion.

VI.

Argument.

1.

A lien exists in favor of petitioner for taxes claimed which is not voided by the bankruptcy act.

In practically every state of the union the common law doctrine of the sovereign being entitled to satisfaction in full of its debt due from an insolvent debtor is effective. That doctrine has been extended in the State of Missouri so as to constitute such right a lien upon the assets of the insolvent debtor. In the early case of State of Missouri to the use of Phillips et al. vs. Rowse, 49 Mo. 586, 592, the Supreme Court of Missouri, the court of last resort, stated:

> "By the common law all debts due the crown were preferred to claims of private citizens. So far as taxes are concerned, every consideration requires that this rule be rigidly observed. The liability for them is not an ordinary one, and cannot be likened to a common debt. Their collection is vital to the enforcement of the law and the very existence of government, and I know of no authority that places the obligation to pay them upon a level with liabilities upon contracts. If the claim of the State were an ordinary one, such as might arise on behalf of an individual, the authorities cited might show that its priority was lost by the assignment, but the obligation to pay taxes can never be so considered, although there may be no express statutory provision upon the subject."

and further the court stated, l. c. 592, 593:

> "The claim of the State may be likened to an equitable lien—one that is not actual and will follow the property into the hands of a bona fide purchaser for value, but still a quasi lien that attaches to the property until it encounters a higher equity. Such liens are not discharged by an assignment for the benefit of creditors. 'The prevailing rule now is that neither

the assignee nor the creditors whom he represents are purchasers for a valuable consideration without notice, as against prior equitable liens. There must be some consideration passing at the time of the assignment, some new responsibility incurred, or some rights given up, to invest an assignee with this character.' (Burr. Assign. 2d ed., 484). The author, on the same page, mistakes the spirit of our decisions when he says that 'in Missouri assignees are treated as bona fide purchasers for valuable considerations,' and refers to Gates v. Labeaume, 19 Mo. 17. The consideration is sufficient to support the assignment as against the statute of frauds, and so it is held in all the States, but it is not such as to cut off equities that were good against the assignor. The assignee, so far, stands in his shoes. * * * *"

Although the foregoing case was decided prior to the enactment of Section 3152 Revised Statutes of Missouri 1929, which section is set out at page 5 of this petition and brief, and is but a legislative declaration of the common law doctrine of the sovereign being entitled to first satisfaction of debts, yet it is certain that by the legislative enactment of this section it was not intended to vary or change the lien determined by the Courts of Missouri to attach to debts due the state. Section 3152 was first enacted in 1881, Laws of 1881, page 35. The title to the Act of which that section was a part, is as follows, "An act to secure to the State of Missouri a priority of *lien* in the case of insolvent debtors to the State." The title of an act is a part of it and should be considered in construing the act. Glaser vs. Rothchild, 221 Mo. 180. This title clearly indicates an intention to create a lien in favor of the State of Missouri and the courts of this state have consistently given the law that construction. The term "debts" as used in Section 3152 Revised Statutes Missouri 1929, has been construed by the court of last resort of this state to include taxes.

State ex rel. Karrenbrock vs. Trust Company, 209 Mo. 471, 491.

From the foregoing it is evident that a lien exists in favor of the state against the assets of the bankrupt for the payment of taxes claimed in the instant proceeding. Let us now consider the question as to the status of such lien under the bankruptcy law. It is recognized that equitable liens are recognized in bankruptcy and enforceable therein.

Hauselt vs. Harrison, 105 U. S. 401, 25 L. Ed. 1075;
Hurley vs. Atchison, Topeka & Santa Fe Railroad, 213 U. S. 126, 53 L. Ed. 729;
Johnson vs. Root Manufacturing Company, 241 U. S. 160, 61 L. Ed. 934.

This court has many times held that under Section 67 of the Bankruptcy Act, all valid liens existing at the time of adjudication except those liens therein especially voided, should be honored and respected by the Bankruptcy Court, and that the legality of the lien is to be governed by the provisions of the state law creating it.

Rock Island Plow Company vs. Reardon, 222 U. S. 354, 56 L. Ed. 231;
Holt vs. Crucible Steel Company, 224 U. S. 252, 56 L. Ed. 756.

Petitioner respectfully urges that by reason of the foregoing the lower court erred in holding and determining "the asserted right of priority (of the state) is not predicated upon any lien that is attached to the property."

2.

If Point 1 of this brief is decided adversely to petitioner it is respectfully urged that the court erred in its construction of the provisions of Sections 64a of the Bankruptcy Act in that;

(a) The lower court's construction of such law is contrary to the spirit and purpose of the Bankruptcy Act.

(b) The lower court's construction of such law ignores the proposition that Federal and State laws are in pari materia with the Bankruptcy Act and all such laws should be construed as having force and effect if they can be construed together.

(c) The lower court's construction of such law ignores the recognized rule that legislative acts are not to be construed as releasing and relinquishing sovereign rights unless such acts do so in plain, specific and unambiguous legislation. If an act is susceptible of two constructions the courts will construe the act as not intending to surrender sovereign or public rights.

(a).

The lower court's construction of Section 64a of the Bankruptcy Act is contrary to the spirit and purpose of the Bankruptcy Act.

The court in its decision held Section 64a of the Bankruptcy Act (11 U. S. C. A. 104a) which reads,

> "the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality"

to require that the taxes owing to such taxing authority be paid with equal priority. In so doing, petitioner urges that the court totally ignored the guiding principles and purposes of the Bankruptcy Act. This purpose is tersely stated by Mr. Justice Holmes in the case of Francis vs. McNeal, 228 U. S. 695, 57 L. Ed. 1029, as follows:

> "The business of such an act is, so far as it may be, to preserve and not to upset existing relations."

The existing relations as applied to taxes due petitioner and respondent city have been established as that of superior and inferior political estates. Since the creation of the City of St. Louis by an act of the legislature of the supreme superior political estate, the State of Missouri, the only power that respondent city has to levy and collect a gasoline tax is that which is authorized and directed by the state through its legislative body. This authority is delegated authority given upon a condition, that condition being that in the event any common debtor be unable to satisfy his debt to both the respondent city and the petitioner, that the respondent city will step aside and allow full satisfaction of

petitioner's claim before any funds are available to apply on respondent city's claim. Section 3152 R. S. Missouri 1929. Page 5 of this petition and brief.

From the very inception or creation of the debt the respondent city knew that its claim was inferior to and subject to the prior payment of any state obligation owing by the debtor. The objects and purposes of the Bankruptcy Act are stated in Remington on Bankruptcy, 4th Ed. Section 20 as follows:

> "The objects and purposes of modern Bankruptcy law are two-fold: First, to secure possession of an insolvent's assets and procure an equitable division among creditors, preventing and avoiding attempts of one creditor to obtain unfair advantage over other creditors therein; and second, to free the worthy debtor from the burden of unpaid debts."

What constitutes the obtaining of unfair advantage by one creditor over others? From other provisions of the act, we find that it is considered as the obtaining of legal preference through court procedure when a debtor is insolvent. We find that it may be the voluntary act of insolvent debtor in delivering property and things of value to some general creditor preferred because of personal relationship or otherwise. In general it is the granting of some special privilege to a particular creditor when the nature of the demand he holds does not in itself entitle such creditor to such preference. By comparing the foregoing general principles with the decision in the instant case it is clear that the lower court's decision permits that to be done which the Bankruptcy Act in policy and purpose has sought to prevent. Such a construction elevates the junior and inferior claim of the respondent city to equal dignity of a paramount obligation and requires that creditor who, by the law existing at the time of the inception or creation of the debt, was entitled to a preference to share the bankrupt's estate with one whose claim has been of the junior and inferior nature since its inception. Such an interpretation was never contemplated by the Congress that enacted the law, and nullifies

the purpose for which the law was enacted, to-wit: To preserve and enforce those rights and priorities which legally and equitably were in existence at the time of the bankruptcy (with the exception of legal preference obtained within four months of the Bankruptcy or for the purpose of defrauding creditors, of which the instant case is not an example).

This recognized policy and purpose has been evident in the uniform construction which has been given to statutory liens of various characters not disturbed by Section 67 of the Bankruptcy Act (11 U. S. C. A. 107) and to Section 64b(7) of the Bankruptcy Act, (11 U. S. C. A. 104(7)). Section 64b(7) reads:

> "Debts owing to any person who by the laws of the states or the United States is entitled to priority:"

This provision means that persons who are entitled to any kind of priority under a state or federal law shall constitute the seventh class of preferred claims. This clause does not state that all parties making up class seven pro rate the funds available for such claims, nor does it h terms state the relative priority to be given claims, a between the claimants within this class. Neither does it adopt in so many words the *relative* priority which may exist by virtue of the specific provisions of the state or federal laws creating the preference recognized. The foregoing is certainly true when we compare this section with its predecessor in the Bankruptcy Act of 1867, Section 28, Chapter 176, Page 531, Laws of 1867; Section 5101 (5) Revised Statutes 1878. This classification was provided in that law as follows:

> "All debts to any person who by the laws of the United States are or may be entitled to priority *in like manner as if the provisions of this title had not been adopted.*"

Clearly the Bankruptcy Act of 1867 specifically adopted the *relative* priority to be accorded claims making up this general classification. In the present Bankruptcy Act this

clause has been omitted, yet the courts have uniformly held that the omission of this clause in the present act has not changed the policy and purpose of the present act, to-wit: To preserve rather than to disturb existing relationships.

The cases, in dealing with liens not voided by Section 67 of the Bankruptcy Act have likewise evidenced this intent not to disturb existing relationships.

The very wording of Section 64a, taken in connection with the policy and purpose of the Bankruptcy Act, negatives the conclusion reached by the lower court. The act requires that the taxes "legally due and owing" should be paid. By the use of the term "legally due and owing" Congress has clearly intended that the attributes which legally attach to the various taxes enumerated are to be respected and followed by the trustee in paying the taxes. The use of this term was not by accident or without concern for its true and full meaning. It contemplates that the taxes enumerated should be paid as they are legally due and owing, that those taxes which have a first preference under the law are to be first paid. Any construction short of this fails to give the full and true meaning to the terms used in the Act. As is stated in the case of In Re Falls City Shirt Manufacturing Company, 98 Fed. 592, in respect to what is now Section 64b(7)

> "The plain intention of congress was to recognize liens and priorities thereunder precisely as the state laws had fixed them. In no other way could the priorities given by the state laws be made effective. In no other way could the debts 'entitled to priority' under the state laws be preferred in the distribution of the bankrupt's assets."

So under Section 64a, in no other way can the trustee pay "taxes legally due and owing" without paying them in the order of their relative priority.

(b).

The court erred in failing to construe Section 3152 R. S. Missouri 1929, in pari materia with Section 64a of the Bankruptcy Act.

There is a Federal statute identified as Section 3466 R. S. United States which fills the same office in respect to the Federal Government as Section 3152 R. S. Missouri 1929 fulfills regarding the state government. This section is the pattern from which Section 3152 was taken and reads in part as follows:

> "Whenever any person indebted to the United States is insolvent or whenever the estate of any deceased debtor, in the hands of executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend * * * * to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The United States Circuit Court of Appeals for the Seventh Circuit in the case of In Re Jacobson, 263 Fed. 883, stated:

> "In other words, Section 64a and 64b of the bankruptcy act are in pari materia with Section 3466."

In the case of In Re E. J. Hibner Oil Company, 264 Fed. 667, the Court by its decision held that said Section 3466 R. S. United States was in pari materia with the bankruptcy law.

In the case of United States vs. Kaplan, 74 Fed. (2d) 664, this Section was held to be in full force and effect except as modified by the bankruptcy act. No distinction can be drawn as a matter of law between this federal act applying to debts due the federal government and Section 3152

R. S. Missouri creating a like priority respecting debts due the State of Missouri.

This Court and the Courts of Appeal have recognized Section 3466 R. S. United States as being in pari materia with Section 64b(7) of the bankruptcy act. That being the case, there is no ground for discrimination between Sections 64a, 64b(6) and 64b(7). We have heretofore pointed out that Section 64b(7) of the bankruptcy act is solely one of classification and does not of its own force and effect require that the claims falling within that classification are to be allowed on an equality or that they be allowed in accordance with the priority established by the relevant state or federal act. Such being the case Section 3466 R. S. United States must be construed as being in pari materia with Section 64a of the bankruptcy act and accordingly Section 3152 R. S. Missouri 1929 must receive a like construction.

It was at one time argued that claims allowed under Section 64b(7) of the bankruptcy act should all be allowed upon an equal basis and paid pro rata. Such was the contention made in the case of In Re Falls City Shirt Mfg. Co., 98 Fed. 592. The claimants were material men who had been allowed priorities subsequent to the landlord's priority. All of the claimants fell within the same classification of the bankruptcy act. The material men took the position that as the bankruptcy act provided the classification of priority and that all claimants falling within that class should receive a pro rata portion of the bankrupt's estate which should be distributed to the claimants in that classification regardless as to the priorities existing between the claimants of that class. The court held against this contention and stated, l. c. 593:

> "* * * * The landlord's lien was in existence June 17, 1899, at and before the adjudication; but the property of the bankrupts certainly did not come into the hands of the trustee until after that time, and probably not until July 3, 1899, when the trustee was appointed and qualified. Not until that event did the lien of the material men arise or exist. It is manifest,

therefore, that the ruling of the referee upon this point was correct, unless, under clause 5, Sec. 64, of the bankruptcy act, all liens arising under the laws of the state are placed upon an even footing, regardless of priorities existing by virtue of the state laws. It is contended on behalf of the material men that such should be the construction of the bankrupt act, but the court is of a different opinion. Section 64 of that act, among other things, provides that debts shall have priority, and that the assets of the bankrupt shall be paid out in a certain order; the fifth in point of preference thereby fixed being 'debts owing to any person who, by the laws of the states or the United States, are entitled to priority.' The effect of the contention of the material men here would be that though all of the creditors had liens created under the laws of the state, and though by those laws some of those liens had priority over others, still a proper interpretation of the bankrupt act would require a general leveling of these liens to a common plane, elevating some and depressing others, so as to destroy all advantage and all distinction given by the state laws. It cannot be admitted that such contention is sound. It seems to the court that it was obviously the intention of congress to recognize all liens created under the laws of the state, and to leave them precisely as it found them. *There does not seem to be any evidence or plausible grounds of contention that congress meant to do anything so unjust or so unjustifiable as a contrary decision would involve.* The plain intention of congress was to recognize liens and priorities thereunder precisely as the state laws had fixed them. * * * * In no other way could the debts 'entitled to priority' under the state laws be preferred in the distribution of the bankrupt's assets. It results, therefore, that the ruling of the referee upon the claim of Glock, and by which he was given a priority in payment to the extent of $640, was correct. He was entitled to it under the laws of the state * * * *."

It is just as logical to argue that all claims falling within Subdivision 64b(7) should be allowed on an equal basis as it is to take the position that all taxes payable under Section 64a are on an equal basis, entitled to the same priority and to be paid accordingly.

In this connecting the distinction between general insolvency laws and specific priority acts should be mentioned. While it is true that general state insolvency laws were suspended by the enactment of the bankruptcy act to the extent that state courts had no jurisdiction to proceed under such insolvency acts yet in the instant case Section 3152 R. S. Missouri 1929 is no part of the general insolvency law of the state. It is a separate and distinct enactment declaratory of the common law existing; amplifying and fortifying the common law priority by establishing a legislative declaration of such right. In this connection we wish to refer to the case of In Re Wright, 95 Fed. 807, 810:

> "* * * 2. Is the debt thus due by the bankrupt to the county of Worcester entitled to priority, under section 64b(5), as a debt owing to a person who is entitled to priority by the laws of Massachusetts? The law of Massachusetts relied upon is Pub. St. c. 157, 104:
>
> 'In the order for a dividend under the preceding section, the following claims shall be entitled to priority, and to be first paid in full in their order: First, all debts due to the United States and all debts due to and taxes assessed by this state, or any county, city or town therein.'
>
> The trustee contends that this section is not now a law of the state of Massachusetts, because, as part of the insolvent law of Massachusetts, it has been suspended by the bankrupt law of the United States. The argument is more ingenious than sound. The bankrupt act of the United States does not repeal or altogether avoid the insolvent laws of the several states, but merely suspends their operation so far as they come in conflict with the bankrupt law, or intrude upon its province. * * * *"

The foregoing case was affirmed by the United States Circuit Court of Appeals, First Circuit, in the case of In Re Worcester County, 102 Fed. 808. While this case dealt specifically with what is now Section 64b(7) of the bankruptcy act concerning debts owing any person who by the laws of the State and United States are entitled to priority, yet it is equally applicable to the provisions of Section 64a

dealing with priorities to be allowed taxes legally due and owing. The Court in closing this opinion made the further pertinent remarks, l. c. 812:

> "In Re Rouse, Hazard & Co., 33 C. C. A. 356, 91 Fed. 96, it was held that a claim for labor performed more than three months before the bankruptcy proceedings, and entitled to priority under the insolvent laws of the state, was not entitled to priority under the bankrupt law; but the decision was rested solely upon the ground that the specific provisions of the bankrupt act concerning labor claims were intended to override the provisions relating to wages made by the state statute. That the exemption accorded by the state statute would have been valid in the absence of the express provisions of the bankrupt act concerning wages was conceded. The bankrupt act makes no such specific provision for debts due to states, counties, and municipalities, and hence, by reference, adopts the statute of Massacnusetts, as part of its own provisions."

As in the foregoing case, the bankruptcy act did not make specific provision as to the relative priority of debts due the state, counties, districts and municipalities, so in the instant case, the bankruptcy act does not specifically designate the relative priorities attributable to taxes due the United States, State, county, district or municipality. As the act is silent on this question, it should be determined according to the relevant law, and in the instant case, the state is to be allowed priority over the city, such priority having been established coincidentally with the creation of the power of taxation granted the city by an act of the general assembly of Missouri over fifty years old.

We also wish to make a few remarks relative to the application by the lower court to the instant case of cases holding that "the right of priority in payment of claims against a bankrupt estate * * * * must be found in the bankruptcy act." That statement is taken from the case of Davis vs. Pringle, 268 U. S. 315, 69 L. Ed. 974, in which case this court held that the United States was not a "person" within the provisions of Section 64b(7) of the Bank-

ruptcy Act, and that therefore an ordinary debt due the United States was entitled to no priority under the provisions of Section 64 of the Bankruptcy Act. It is quite true that if a claimant can point to no provision in the bankruptcy act which will establish his claim within some preferred class he is relegated to the rights of a general unsecured creditor. That statement in the Pringle case supra cannot be extended beyond the proposition there stated. It is elementary that such statements must be considered in view of the circumstances in the case. However, it is not at all applicable to the instant case as clear provision for priority has been established under Section 64a of the Bankruptcy Act. Without question neither Section 3466 R. S. United States or Section 3152 R. S. Missouri standing alone could create a preference (other than a lien) not already provided for in the bankruptcy act, as such would plainly be conflicting with the specific provisions of the bankruptcy act. However, the general order of priority has already been once established by the bankruptcy act and the application of these two sections to claims within the respective classes in no way interferes with or conflicts with the provisions of the bankrupcty act.

(c).

Sovereign rights are not to be released or relinquished in the absence of plain, specific and unambiguous legislation."

This common law right of the sovereign to be first satisfied from assets of the insolvent debtor is as old as the Crown itself. It is thoroughly imbedded in our civil code. Section 3466 United States Revised Statutes, and Section 3152 R. S. Missouri 1929, are each legislative declarations of the common law doctrine of this sovereign right. As stated by Mr. Justice Brandis in the case of United States vs. National Surety Company, 65 L. Ed. 143, 254 U. S. 73, l. c. 75:

"Section 3466, embodying the common law rule by which the sovereign has priority over the other creditors of an insolvent (U. S. vs. State Bank, 6 Pet. 29, 35, 8 L. Ed. 308, 310), declares that 'debts due to the United States shall first be satisfied'."

In the case of State ex rel. Gentry vs. Page Bank, 14 S. W. (2d) 597, (not officially reported), the Supreme Court of Missouri declared that Section 3152 was likewise but a legislative declaration of the existence of the common law doctrine in the State of Missouri. Thus this sovereign right is thoroughly established by the statutory law and judicial decisions of the United States and the State of Missouri.

Legislation which is ambiguous or uncertain will not be presumed to be enacted with an intent to destroy this sovereign right or any other sovereign right, and certainly this right is as important and as well recognized as any common law right of the sovereign. In the case of In Re Tidewater Coal Company, 280 Fed. 648, l. c. 651, this statement is found:

"There is a presumption against any intention to surrender public rights or to affect the government."

Lewis' Sutherland, Statutory Construction (2d) Vol. 2, p. 931, is cited in support of the statement. In the case of Liberty Mutual Insurance Company vs. Johnson Shipyards Corporation, 300 Fed. 952, it is held that there is to be no retreat from sovereign rights without express legislation. In considering the relinquishment of sovereign powers the Supreme Court of the United States in the case of Du-Pont DeNemours and Company vs. Davis, 68 L. Ed. 788, 264 U. S. 456 stated, l. c. 462:

"In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain' * * * *; and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carrier during federal

control * * * * are property of the United States * * * *. An action by the director general to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity * * * *, and, therefore, is subject to no time limitation, in the absence of a congressional enactment clearly imposing it * * * *."

Section 64a provides in part:

"The trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district and municipality."

There is nothing in that clause stating that such taxes shall be paid pro rata or that they should be paid in like manner as if the provisions of this title had not been adopted. After ordering the taxes paid the specific provisions of the bankruptcy act end. It is by mere assumption or presumption that the court has determined an intention on the part of congress that these taxes should all be paid on an equal basis. Such a decision contemplates that the attitude of congress has changed over the years and that it is no longer the intention of the United States to claim and demand priority in payment of taxes over the State, county, district or municipality. Such a statement is found in the opinion by Judge Holmes in the case of Davis vs. Pringle, supra, but promptly after that decision was handed down denying to the United States a priority for debts due it, the congress of the United States amended pertinent provisions of the bankruptcy act defining "person" so as to include the United States, thereby reasserting the right of the sovereign to prior payment of debts. In view of that act of congress there should be no question or doubt that the congress of the United States had no intention of relinquishing the right of the United States to payment in full of its taxes due from a bankrupt estate before any assets of the estate were distributed for the payment of the taxes due any creditor, State, county, district or municipality, and that had the Congress intended that funds which could be applied to payment of

taxes under Section 64a of the Bankruptcy Law should be pro rated between the various taxing authorities presenting claims it would have so specifically provided and not left the matter to surmise and conjecture. The opinion of the lower court has construed away the sovereign right of the United States and of the State of Missouri to prior payment of taxes. The Federal Judiciary has in the past always construed federal laws so as to avoid encroaching upon the sovereignty of the states. Only when the law by its plain, certain and unambiguous language has required the abolition of a state right has the Federal Judiciary so rendered its decision, and for this reason alone petitioner respectfully asserts that the lower court has misconstrued Section 64a of the Bankruptcy Act.

3.

Discussion of cases cited in lower court opinion.

The intention and meaning of Section 64a of the Bankruptcy Act has in the past been obstructed and obscured by the remarks of this court in the case of New Jersey vs. Anderson, 203 U. S. 483, 492; 23 S. Ct. 137, 51 L. Ed. 284, and by a few lower court decisions wherein the remarks of the court have been obitur dictum or have failed to consider the views hereinbefore expressed. Petitioner realizes that the discretion of this honorable court cannot be called into exercise unless some extraordinary reason is shown therefor. Petitioner believes that the unfortunate remarks of this court in the case of New Jersey vs. Anderson supra have had a great bearing upon the decisions of the lower courts on the issue here involved. These remarks are contained in a short paragraph at the opening portion of the opinion and are as follows, l. c. 489:

> "The requirement of the present law is a wide departure from the act of 1867 and specifically obligates the trustee to pay all taxes legally due and owing without distinction between the United States and the State, county, district or municipality."

That remark is not in the least necessary for a determination of the issue there involved as the sole question before the Court at that time was whether or not state taxes due the State of New Jersey should be allowed and paid as a preferred claim or as a general unsecured claim. There was no controversy between the State of New Jersey and any other tax claimant, the sole question was whether or not a franchise tax was a tax within the meaning of the pertinent provisions of the bankruptcy act. While it is true that a comparison between the acts of 1867 and 1898 was considered in the foregoing quoted statement, a like comparison of the acts of 1867 and 1898 in respect to Section 64b(7) would have required the court to make the statement that all claims allowable under Section 64b(7) should be ordered paid "without distinction." This statement of the Court is being used as a guide by lower courts in construing Section 64a of the present bankruptcy act and this court should not longer permit the lower courts to pass upon such weighty matters without this court thoroughly considering and determining the proper rule to be applied. Under present conditions one of the most involved and pressing problems with which Bankruptcy Courts are required to deal is that of taxes. With ever increasing Federal, State and local taxes a much greater proportion of the bankrupt's estate is being paid to satisfy these claims. There are many many cases in which the assets of the estate are insufficient to pay all tax claims. This office now has on hand a number of pending tax proceedings wherein this case will serve as a rule and guide. Each year there has been a great increase in gasoline taxes. State sales tax problems have recently been adopted. These together with the many new federal excise taxes will cause many more conflicts between the taxing authorities over the estates which are insufficient to meet the tax demands. The lower courts should be fully and finally advised in an authoritative opinion of this court as to the proper construction of Section 64a of the Bankruptcy Act.

The opinion of the lower court in the instant case has cited cases in support of its conclusion other than the case of New Jersey vs. Anderson, supra. We desire to discuss these briefly.

In the case of City of Waco vs. Bryan, 127 Fed. 17, the Circuit Court of Appeals for the Fifth Circuit had before it the question as to whether or not the trustee should pay taxes claimed by the City of Waco in the amount of some $500.00 which were a lien upon property, less than ten per cent of which never came into the hands of the trustee. No issue was made as to the priority between taxes under Section 64a of the Bankruptcy Act. The whole issue was whether or not the act required the payment of taxes when the bankrupt court did not receive benefit of the property. From the order of the court it was clear that the taxes were to be paid "in advance of payment of dividends to creditors." That was the issue.

In the case of A. J. Waterman Manufacturing Company, 291 Fed. 589, the District Court of the Southern Division of Maine was confronted with a claim of $8,000.00 due the United States and $6,000.00 due the City of Portland, with but $6,000.00 in the estate with which to pay these claims and the costs of administration. The district court considered at great length the claim that the United States was entitled to payment of its taxes prior to payment of costs of administration but it dismissed the claim of the United States that the United States was entitled to priority over the City of Portland with a mere statement that "That section (64a) is distinct in putting all taxes on an equality." The court made no distinction between the points and determined the latter upon the reasoning of the former. In doing so it acted erroneously and its decision cannot be construed as authority on the point.

In the case of In Re Wiley, 292 Fed. 900, the District Court of the Northern Division of Georgia had before it an estate wherein the United States claimed $4,000.00 in taxes and the State $400.00. The bankrupt's estate consisted of approximately $2,300.00. The Court held that

the taxes were to be paid pro rata, basing its decision upon the proposition that, l. c. 901:

> "Debts due the United States are given a first priority, apparently extending to cases of bankruptcy by R. S. Sec. 3466 (Comp. St. Sec. 6372); but taxes are hardly to be considered debts (N. J. vs. Anderson, 203 U. S. 483, 492; 27 S. Ct. 137, 51 L. Ed. 284."

This of course is not as correct a statement of the law as it exists today as has much more recently been held in the case of Price vs. United States, 269 U. S. 492, 70 L. Ed. 373. In the latter case it was held that in federal priority statutes the term "debts" includes taxes, referring specifically to United States Revised Statutes, Section 3466.

In the case of A. E. Fountain Incorporated, 295 Fed. 873, the District Court of the Southern Division of New York had before it an estate wherein the State of New York was claiming franchise taxes and the commissioner of internal revenue was claiming various taxes due the United States. However, an agreement to divide the fund pro rata between the State of New York and the United States was entered into. Under those circumstances the holding is not to be given great weight.

In view of the foregoing petitioner asserts that the law in respect to proper construction of Section 64a of the Bankruptcy Act is in an uncertain and confused state. That the lower courts have been groping in the dark, occasionally following the obitur dictum of the New Jersey vs. Anderson case supra, and that the entire question should be fully and completely decided by this court.

VII.

Conclusion.

Petitioner respectfully asserts that this case is not one involving mere local interests or an isolated instance of conflict in tax claims. In the last two years a great number of cases have been handled by the Attorney-General's

Office of the State of Missouri wherein this identical problem has arisen. Many of these cases are now pending. A like situation exists in every state of the Union. With the advent of the Sales Tax as a new means of raising state revenue and with the levy of numerous additional federal excise taxes, the greater portion of which are clothed with specific statutory lien, this problem is and will be one of increasing importance. This Court in the case of New Jersey vs. Anderson supra has made a statement purportedly construing Section 64a of the Bankruptcy Act, which statement is but obitur dictum and was not made after a thorough and extensive study of the particular provision. The comparison of the acts of 1867 and 1898 which was made was the only consideration upon which the statement was based. The facts which petitioner have placed before the court as to the construction of this section are pertinent and outweigh the reason upon which the statement in New Jersey vs. Anderson was based.

We respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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